TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 34

SEARS, ROEBUCK AND CO., A NEW YORK CORPORATION, PETITIONER,

vs.

BRUCE A. MACKEY, INDIVIDUALLY, AND TIME SAVER TOOLS, INC., AN ILLINOIS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 24, 1955

CERTIORARI GRANTED MARCH 28, 1955

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 53 C 1240

Bruce A. Mackey, Individually and Time Saver Tools, Inc., an Illinois Corporation, Plaintiffs,

vs.

Sears, Roebuck and Co., a New York Corporation, Defendant

Statement Pursuant to Rule 10(b) of the United States Court of Appeals for the Seventh Circuit

The above cause was commenced on May 21, 1953.

The original parties plaintiff were Bruce A. Mackey and Time Saver Tools, Inc., an Illinois corporation.

The original party defendant was Sears, Roebuck & Co., a New York corporation.

No change in parties has taken place since the commencement of this suit.

Defendant's motion to dismiss the complaint was filed on July 13, 1953.

Defendant's amended motion to dismiss the complaint and defendant's answer to Count III of the complaint were filed on December 4, 1953.

The defendant was not arrested; no bail was taken; no property was attached.

On May 19, 1954, the United States District Court entered the order and judgment from which this appeal is taken.

Notice of appeal was filed on June 8, 1954.

Respectfully submitted, (S.) Edward I. Rothschild, John Paul Stevens, Norman J. Barry, Attorneys for Appellants.

[fol. 3] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT—Filed May 21, 1953

Count I

Bruce A. Mackey, Plaintiff, by his attorneys, complains of Sears, Roebuck & Co., a New York corporation, Defendant, as follows:

1. This action arises under Sections 1 and 2 of the Sherman Act (26 Stat. 209, 210, 15 U. S. C. Section 2); Sections 2 (f) and 3 of the Robinson-Patman Act (38 Stat. 730, 49 Stat. 1526-1528, 15 U. S. C. Sections 13 (f) and 13 a) and Sections 3, 4 and 16 of the Clayton Act (38 Stat. 731, 737, 15 U. S. C. Sections 14, 15 and 26).

2. Bruce A Mackey (hereinafter referred to as "Mackey") is a citizen and resident of the State of Illinois.

3. General Metalcraft Corporation, a corporation, was incorporated under the laws of the State of Illinois in March of 1939. On May 11, 1948, said corporation was dissolved. On May 11, 1948, General Metalcraft Company, a corpora-[fol. 4] tion, was incorporated under the laws of the State of Illinois. General Metalcraft Company was the successor in interest to General Metalcraft Corporation. General Metalcraft Company was dissolved in August of 1952. The term "Metalcraft" will be used hereinafter to refer to either or both of said corporations, as may be appropriate. During the corporate existence of Metalcraft, Mackey owned all of its capital stock. As such sole shareholder, Mackey is the owner in liquidation of all of the assets, rights, claims and causes of action formerly owned by Metalcraft.

4. After 1945 Metalcraft was engaged in the business of manufacturing and selling nursery lamps and other gift items. Metalcraft purchased component parts in New York, Wisconsin, Ohio, Kentucky and Illinois, and made them into nursery lamps in Illinois. Such lamps were sold and delivered by Metalcraft to retail stores in other states in all

sections of the United States. Metalcraft was engaged in interstate commerce.

5. Time Saver Tools, Inc., a corporation (hereinafter referred to as "Time Saver"), was incorporated under the laws of the State of Illinois on November 24, 1951. Mackey is the owner of all of Time Saver's capital stock.

6. Time Saver is engaged in the business of manufacturing and selling tools. The tools sold by Time Saver are manufactured in Illinois and delivered by Time Saver to customers throughout the United States. Time Saver is engaged in interstate commerce.

7. Sears, Roebuck & Co., (hereinafter referred to as "Sears"), is a New York corporation, with its principal place of business in Chicago, Illinois. It does business and is found in the Northern District of Illinois.

8. Sears is engaged in the general merchandising retail business. It sells nursery lamps, gift items, tools, juvenile furniture, toys, notions, home furnishings, appliances, housewares and many other items and commodities to consumers. It sells more merchandise to consumers through its mail order facilities than any other corporation in the world, and in addition, operates over 700 retail stores located in all parts of the United States and in several foreign countries. More than a million dollars' worth of merchandise was transported from one state to another [fol. 5] state during each day of 1952 as a result of purchases and sales by Sears. Sears is engaged in interstate commerce.

9. Sears' net sales in the year ended January 31, 1951 were $2,556,371,110.00. Sears' net sales in the year ended January 31, 1952 were $2,657,408,447.00. Sears' net sales in the year ended January 31, 1953 were $2,932,337,701.00. In each of the years 1950, 1951 and 1952 Sears' net sales were the highest in its history. Sears' net sales during the first four months of 1953 were higher than in any other comparable period in its history.

10. The tremendous volume of Sears' purchases and sales gives it the power to ignore normal business considerations, such as the probability of making a profit out of a particular transaction, in determining its policies with respect to purchases or sales of particular products in particular

areas. It has the power, by means of actual or threatened refusals to deal with particular suppliers in particular areas, or by means of actual or threatened sales of particular products in particular areas at unreasonably low prices, substantially to destroy the business and property of its small competitors and small suppliers. Sears has exercised its tremendous power to discipline and punish suppliers who have been unwilling to do business with Sears on terms dictated by Sears. The actions by means of which Sears has disciplined and punished such suppliers have been motivated by a specific intent to injure and destroy such suppliers, to injure and destroy potential competitors of Sears who make purchases from such suppliers, and to deter all suppliers dealing with Sears from resisting demands made of them by Sears. The exercise of Sears' tremendous power for the purpose of destroying the business and property of a supplier or competitor engaged in interstate commerce constitutes an attempt to monopolize a part of the trade or commerce among the several states. Such acts have the purpose and effect of unreasonably restraining competition among suppliers and potential suppliers of Sears and of restraining trade between such suppliers and Sears by causing them to feel that Sears will exercise its power against them in a similar way if they refuse to deal with Sears on terms dictated by Sears.

11. Beginning in 1949 and continuing down to the date of the filing of this complaint, Sears has been engaged in a con- [fol. 6] tinuing attempt to destroy each and every business owned, controlled or managed by Mackey, and thereby to punish Mackey for refusing to deal with Sears on terms dictated by Sears, and to deter others from refusing to deal with Sears on terms dictated by Sears. Sears' destruction and monopolization, and attempted destruction and monopolization, of Mackey's business has included the acts and practices hereinafter alleged.

12. Metalcraft began selling nursery lamps to Sears and others in 1945. In 1946 Sears notified Metalcraft that it would discontinue its purchases from Metalcraft unless Metalcraft refrained from selling nursery lamps to competitors of Sears. Thereafter, until the breach of contract hereinafter alleged, Metalcraft did sell nursery lamps exclusively to Sears.

13. During 1948 and 1949, Sears from time to time failed and refused to carry out its contract obligations to accept delivery and to pay for merchandise ordered from Metalcraft, and demanded extensions of said contracts. As a result of such extensions, Mackey was required to give his personal guarantee of the obligations of Metalcraft.

In the Spring of 1949, when Metalcraft was under contract to supply Sears with 30,000 nursery lamps at a price of $2.20 per lamp, Sears instructed Mackey to cause Metalcraft to agree to a 20% reduction in price, and notified Mackey that if such reduction were refused, Sears would ruin Mackey and Metalcraft and make it impossible for Metalcraft to continue in business.

14. Mackey refused to agree to such a price reduction, or to cause Metalcraft to agree to it. When Sears then refused to take delivery of the nursery lamps which it had contracted to purchase, Mackey, through Metalcraft, attempted to promote the sale of said lamps through department stores in Milwaukee and Detroit. With the specific intent of destroying such promotions and making it impossible for Metalcraft to dispose of its products, Sears sent substantial quantities of lamps which it had previously purchased from Metalcraft for $2.20 a piece to each of said cities, though not to other comparable cities, for sale in its retail stores at 94¢ a piece. At the same time, Sears listed these lamps in two of its catalogs at 84¢ a piece, and obtained a cheap imitation of Metalcraft's lamps which it [fol. 7] misrepresented in its advertising as Metalcraft's lamps and sold to persons ordering from Sears' catalog representation of Metalcraft's lamp. The purpose and intent of said sales below cost, and such misrepresentation and unfair competition, was to destroy the market for Metalcraft's products. The effect of such acts was to make it impossible for Metalcraft to dispose of its inventory of lamps. As a direct result of Sears' acts Metalcraft became insolvent and was dissolved by action of the Attorney General of Illinois on August 8, 1952.

15. On or about September 1, 1951, Mackey promised the Vascoloy-Ramet Corporation (hereinafter referred to as "Vascoloy"), to promote the sale of carbide and tantung tools, tool tips and investment castings, and certain other

products manufactured by Vascoloy, and Vascoloy promised to pay Mackey a commission of 5% on sales made by Mackey. Pursuant to said agreement, between January 1, 1952 and October 27, 1952, Mackey received commissions of $5,159.19 on sales of Vascoloy's products to Rotex Company, a corporation, with its principal place of business in Dallas, Texas. The goods which were subject to these sales were transported in interstate commerce from the State of Illinois to the State of Texas. Rotex resold such products to Sears.

16. On or about October 27, 1952, Sears demanded that Vascoloy cease paying commissions to Mackey and advised Vascoloy that unless its commission arrangement with Mackey was terminated, Sears would refuse to make further purchases from Vascoloy or its customers. Pursuant to said demand by Sears, Vascoloy notified Mackey that it would no longer perform its obligations under the contract made between Mackey and Vascoloy on or about September 1, 1951. Sears' demand that Vascoloy terminate said agreement was the sole and proximate cause of its termination.

17. In April of 1951, Mackey invented a novel type of boring set for use with ¼" electric drills; application for a patent on said tool is pending. In the Spring of 1952, Mackey collaborated on the development of a new type of carbide-tipped lathe bit. Time Saver was formed to manufacture said boring set and to sell said boring set, lathe bit and other tools. As a result of Time Saver's national advertising and other promotional efforts, Time Saver has created a market for said tools and said tools have become identified with Time Saver.

[fol. 8] 18. In December of 1952, Sears arranged to purchase, and is now purchasing, carbide-tipped lathe bits which are copies of the carbide-tipped lathe bits developed by Mackey. Sears arranged to purchase and is now purchasing, plastic cases in which to package, display and resell said lathe bits, which are identical copies of the plastic cases used by Time Saver. The Sears' case contains the same legend on its display surface, the same type, size and colored lettering, and the same unique diagram as Time Saver's case. The words "Craftsman" and "Sears Roebuck & Co." are substituted for the words "Time Saver Tools, Mundelein, Ill." Sears has deliberately caused said case

and tool to be made to appear to be the same as the case and tool sold by Time Saver in order to appropriate the market for the Time Saver tool and to carry out Sears' plan to destroy each and every business engaged in by Mackey.

19. In or about June of 1952, Sears made arrangements to have Mackey's boring set copied. Sears has instructed its supplier to continue to manufacture copies of Mackey's boring set despite notice of Time Saver's patent application and prior rights in said set, and despite knowledge that said copies infriage on the invention embodied in Mackey's patent application.

20. Sears advertised the sale of said boring set at prices below the manufacturing cost thereof, induced its supplier of said boring set to sell the same to it below the manufacturing cost thereof with a promise of large future orders after Sears was successful in appropriating Time Saver's market therefor, and induced its supplier of said lathe bit to sell the same to it at prices lower than those charged Time Saver by the same supplier. Sears has advertised said tools for sale, and has sold them at unreasonably low prices with the specific purpose of appropriating the entire market therefor, of destroying Time Saver's sales thereof, and of injuring Time Saver's reputation by making it appear that Time Saver's prices for said tools are excessive.

21. Sears has sold such tools in some parts of the United States at prices lower than the prices exacted by Sears elsewhere in the United States for the purpose of destroying competition from Mackey or Time Saver.

22. All of the aforesaid acts and practices have been performed by Sears pursuant to its continuing plan to destroy [fol. 9] each and every business in which Mackey has engaged or may attempt to engage. The purpose and effect of this plan has been to discipline small suppliers and small competitors of Sears and cause them to accept terms dictated by Sears when entering into business dealings with Sears. Competition among persons who supply products of the kind which Sears purchases for resale in its stores has thereby been materially and unreasonably restrained. The aforesaid acts and practices constitute an attempt to monopolize each and every interstate business in which Mackey, or persons or corporations affiliated or controlled by Mackey, would otherwise engage. They also constitute

an attempt to exercise undue control over, and thereby to monopolize, all of the interstate commerce engaged in by small companies making sales to Sears, or who would be competitors in the market for products sold by Sears in its retail stores but for Sears' program of disciplining its suppliers.

23. If Sears had not engaged in the aforesaid continuing attempts to monopolize, Mackey, or corporations wholly controlled by Mackey, during the two years preceding filing of this complaint, would have had earnings and profits from the manufacture and sale of nursery lamps of approximately $150,000.00; commissions on the sale of products manufactured by Vascoloy in the amount of $15,000.00; earnings and profits on the sale of carbide-tipped lathe bits in the amount of $20,000.00; and earnings and profits in the manufacture and sale of boring sets in the amount of $5,000.00.

Wherefore, Plaintiff, Bruce A. Mackey, demands judgment against Sears in the amount of $570,000.00, plus his attorneys' fees and cost of suit, as authorized by Section 4 of the Clayton Act.

Plaintiff, Bruce A. Mackey, further prays that the court enter its injunctive decree perpetually restraining Sears from continuing the aforesaid attempt to monopolize and granting such further and additional relief as to the Court may seem meet.

Count II

For his second cause of action, Mackey says:

1. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1332. The amount herein in controversy exceeds $3,000.00, exclusive of interest and costs.

[fol. 10] 2. The allegations contained in Paragraphs 2, 3, 4, 7, 12, 13 and 14 are hereby incorporated herein by reference.

3. The reasonable value of Metalcraft as a going business in 1949 was $250,000.00. Mackey was required to pay out of his personal funds approximately $50,000.00 to discharge obligations of Metalcraft guaranteed by him.

Wherefore, Plaintiff Bruce A. Mackey demands judgment against Sears in the amount of $300,000.

Count III

For his third cause of action, Mackey says:

1. The allegations contained in Paragraph 1 of Count II, and Paragraphs 2, 7, 15 and 16 are hereby incorporated herein by reference.

2. The reasonable value of Mackey's contract with Vascoloy on October 27, 1952, was in excess of $75,000.00.

Wherefore, Plaintiff Bruce A. Mackey demands judgment against Sears in the amount of Seventy-Five Thousand Dollars ($75,000.00).

Count IV

Time Saver Tools, Inc., an Illinois corporation, Plaintiff, by its attorneys, complains of Sears Roebuck & Co., a New York corporation, Defendant, as follows:

1. The allegations contained in Paragraph 1 of Count II, and in Paragraphs, 5, 6, 7, 8, 17, 18, 19, 20, 21 and 22 of Count I, in which Counts Bruce A. Mackey is the plaintiff, are hereby realleged and incorporated herein by Time Saver Tools, Inc. by reference.

2. The reasonable value of the business appropriated by Sears from Time Saver by means of the aforesaid acts is Two Hundred Thousand Dollars ($200,000.00).

Wherefore, Plaintiff Time Saver Tools, Inc. demands judgment against Sears in the amount of Two Hundred Thousand Dollars ($200,000.00).

Count V

For its second cause of action against Sears, Time Saver says:

1. This action arises under Section 2(f) of the Robinson-Patman Act (38 Stat. 730, 49 Stat. 1526-28, 15 U. S. C. [fol. 11] Sec. 13(f) and Sections 4 and 16 of the Clayton Act (38 Stat. 731, 737, 15 U. S. C. Sections 15 and 26).

2. The allegations contained in Paragraphs 5, 6, 7, 8, 9, 10, 11, 17, 18, 19, 20, 21 and 22 of Count I, in which Counts Bruce A. Mackay is the plaintiff, are hereby realleged and incorporated herein by Time Saver Tools Inc. by reference.

3. Sears is engaged in the business of purchasing and reselling carbide-tipped lathe bit sets, plastic boxes, and boring sets, and each of said items, in interstate commerce.

4. In the course of such commerce Sears knowingly received from each of its suppliers of each of said items a price which was lower than the price charged by each of said suppliers to competitors of Sears, including Time Saver.

5. Knowing receipt of such price discriminations by Sears has substantially injured competition between Sears and Time Saver and tended to create a monopoly in Sears in the business of reselling such items in interstate commerce.

6. If the prices charged of Time Saver by suppliers who were simultaneously selling carbide-tipped lathe bit sets, plastic boxes and boring sets to Time Saver and to Sears had been no higher than the prices which were then being charged to Sears, Time Saver would have spent Fifteen Hundred Dollars ($1,500.00) less than it actually did spend for such supplies during the two years preceding the filing of this complaint.

Wherefore, Time Saver demands judgment against Sears in the amount of Forty-Five Hundred Dollars ($4,500.00) plus its attorneys' fees and cost of suit as authorized by Section 4 of the Clayton Act.

Count VI

For an additional cause of action Mackey says:

1. The allegations contained in Paragraph 1 of Count II and in Paragraphs 2, 3, 4, 5, 6, 7, 8, 11; 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 of Count I are hereby incorporated herein by reference.

2. All of the aforesaid acts and practices were performed by Sears in furtherance of its continuing plan to destroy each and every business in which Mackey has engaged or may attempt to engage. Said acts and practices have in [fol. 12] fact destroyed the business of Metalcraft, caused Vascoloy to breach its contract with Mackey, and appropriated the market created by Mackey through Time Saver for said boring set and said carbide-tipped lathe bits.

3. The value of Metalcraft as a going business in 1949 was $250,000.00. The loss to Mackey on said obligations of Metalcraft so guaranteed by him was approximately $50,000.00. The value of Mackey's contract with Vascoloy on October 27, 1952 was in excess of Seventy-Five Thousand Dollars ($75,000.00). The value of the market for said tools so appropriated was Two Hundred Thousand Dollars ($200,000.00).

4. The aforesaid acts and practices have caused Mackey damage, in addition to the specific amounts alleged in Paragraph 3 above, in the injury to Mackey's business reputation and ability to engage in any business.

Wherefore, Plaintiff Bruce A. Mackey demands judgment against Sears in the amount of Six Hundred Fifty Thousand Dollars, ($650,000.00).

Bruce A. Mackey and Time Saver Tools, Inc. Plaintiffs, By Edward I. Rothschild, John Paul Stevens, Norman J. Barry, Their Attorneys.

Rothschild, Stevens & Barry,
120 South La Salle Street
Chicago 3, Illinois
FRanklin 2-0653

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, plaintiffs demand a jury trial of the issues raised by the foregoing complaint.

Bruce A. Mackey and Time Saver Tools, Inc. Plaintiffs, By Edward I. Rothschild, John Paul Stevens, Norman J. Barry, Their Attorneys.

[fol. 13] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT TO DISMISS COMPLAINT—Filed July 14, 1953

Now comes defendant, Sears, Roebuck and Co., a corporation, by Leo H. Arnstein and Herbert E. Ruben, its attorneys, and moves the Court to dismiss the complaint

heretofore filed and each count thereof, or in the alternative to strike the complaint, or in the alternative to require the plaintiffs to make said complaint more definite and certain (all under Rule 12 of the Federal Rules of Civil Procedure), and for grounds of said motion shows to the Court the following:

1. There is a misjoinder of parties plaintiff in that the acts of which the plaintiff, Bruce A. Mackey, complains are in no wise related to the acts of which Time Saver Tools, Inc., an Illinois corporation, complains; the allegation in the complaint that Mackey is the sole stockholder of Time Saver does not transfer any cause of action from the corporation to the individual, or justify the joinder attempted here.

2. Count I of the complaint purporting to state a cause of action under the Sherman and Clayton Acts does not state a cause of action under these statutes. It consists almost entirely of unwarranted and prejudicial conclusions of the pleader and at best incompletely states facts which, if properly pleaded, might conceivably state a cause of action for isolated and disconnected acts of common law tort or breach of contract running variously to Metalcraft, Mackey, or Time Saver Tools, Inc. No facts are alleged tending to show a conspiracy to monopolize the existence or likelihood of abuse of monopoly power, acts done in furtherance of an attempt to monopolize, any undue restraint upon commerce, or any injury to the public. Neither specific damages to plaintiffs proximately resulting from the alleged violation of the anti-trust statutes nor a factual basis for the granting of the injunctive relief sought are pleaded.

3. Count II of the complaint apparently purports to state a common law cause of action for breach of contract and [fol. 14] and unfair competition arising out of Mackey's dealings with defendant in the manufacture and sale of lamps. Count II fails to state a cause of action under either theory of liability. There is no allegation as to whether the contract referred to was in writing or oral. The terms of the contract are not stated, the exact date of the contract is not set forth, there is no allegation that

Metalcraft was ready, willing and able to perform its alleged contract, there is no allegation as to whether Metalcraft acquiesced in Sears' alleged demands for extensions of delivery dates, the number of lamps allegedly refused by defendant in breach of the contract is not pleaded, nor are any facts alleged upon which the conclusion of palming off and misrepresentation could be based. The damages alleged are not the proper measure of damages resulting from defendant's alleged breach of contract and are speculative, remote and not causally related to the alleged wrongful acts.

4. Count III of the complaint purports to state a common law cause of action for inducing breach of an alleged contract between Mackey and Vascoloy-Ramet. Plaintiffs fail to allege facts showing the duration, territorial limits, and other terms of the alleged contract, whether said contract was oral or in writing, knowledge by the defendant of the existence of the contract, and malice on the part of the defendant. Count III fails to allege whether the "demand" by Sears set forth in Paragraph 16 of the complaint was oral or in writing, by whom said demand was made, whether the person making said demand had authority to speak for Sears and whether or not Mackey agreed to the termination of said contract with Vascoloy-Ramet or refused to agree thereto.

5. Count IV of the complaint apparently purports to state a common law cause of action for unfair competition with some implication of patent infringement. It consists almost entirely of conclusions of the pleader and fails to state a cause of action under either theory of recovery. No facts are stated to support the allegation that Time Saver Tools, Inc. had acquired common law rights in its packaging, trade name or trademark, if any, and that there was or is confusion with defendant's goods or the likelihood of confusion. Time Saver's claim in paragraph 17 of Count I, re-alleged in Count IV, that its products had be- [fol. 15] come identified with Time Saver is an attempt to have the court sanction monopoly control of non-patented devices. No facts are alleged showing the existence of a market for defendant to appropriate, of prior

rights in the tools referred to or in support of the allegations that defendant's prices were "unreasonably low".

6. Count V of the complaint purports to state a cause of action for violation of the Robinson-Patman Act. Plaintiffs fail to allege that each of the products in question, to-wit: carbide-tipped lathe bit sets, plastic boxes and boring sets are purchased by both plaintiffs and defendant from the same supplier, and plaintiffs further fail to allege facts showing a lessening in competition, a tendency towards the creation of a monopoly and specific allegations as to damages. Plaintiffs further fail to allege facts showing that the transactions in question occurred in interstate commerce.

7. Count VI of the complaint apparently purports to state a cause of action based upon some catch-all theory of tortious interference with plaintiff Mackey's business venture, and seeks remote and speculative damages. The allegations of this Count VI are merely repetitious of the allegations of Counts II, III and IV of the Complaint alleging respectively that defendant engaged in unfair competition with Metalcraft, induced a breach of Mackey's employment contract and engaged in unfair competition with Time Saver Tools, Inc.

8. Paragraph 9 of Count I of the complaint is entirely irrelevant and immaterial to the allegations of the complaint.

9. Paragraphs 10 and 11 of Count I of the complaint and as realleged in other counts consists entirely of unwarranted and prejudicial conclusions of the pleader, and should be stricken.

10. Paragraph 12 of the complaint shows upon its face that the corporation therein named, to-wit: Metalcraft, voluntarily accepted the requirements by the defendant that it, Metalcraft, sell its lamps only to Sears, and hence said allegation is immaterial and irrelevant and should be stricken.

11. Paragraph 13 of Count I of the complaint and as re-alleged in other counts is irrelevant and immaterial to the allegations of the complaint except insofar as it alleges a breach of contract and this latter allegation is a mere

[fol. 16] conclusion of the pleader. This paragraph should be stricken.

12. Paragraph 14 of the complaint fails to set forth the alleged date or dates when Sears sent quantities of lamps to Milwaukee and Detroit or listed same in its catalogs, does not set forth either within the paragraph itself or as an exhibit, the alleged misrepresentations by Sears in its advertising of lamps, does not show the relationship of the dates of said alleged activity to the dissolution of Metalcraft and the alleged effect of the defendant's alleged acts is a mere conclusion of the pleader.

13. Paragraph 15 fails to specify whether the alleged contract was oral or in writing, its duration, territorial limits, and other terms and further fails to allege knowledge and malice on the part of the defendant.

14. Paragraph 16 fails to allege whether the "demand" by Sears was oral or in writing, by whom it was made, and whether the person making said demand had authority to bind the defendant.

15. Paragraph 17 does not set forth with whom Mackey collaborated on the development of the carbide-tipped lathe bit, nor as to whether Mackey has any proprietary interest in said carbide-tipped lathe bit. Said paragraph is further deficient in that the allegations of the last sentence are mere conclusions of the pleader—no facts are set forth to establish what type of initial advertising and other promotional efforts Time Saver Tools, Inc. engaged in, in what area or what areas it has allegedly created a market for said tools, the number of tools sold by it and the manner in which said tools allegedly have become identified with Time Saver Tools, Inc.

16. The last sentence of paragraph 18 of the complaint is a mere conclusion of the pleader, unsupported by any allegations of fact.

17. Paragraph 19 refers to an alleged "invention" embodied in Mackey's patent application, without setting forth any definition or facts as to what the invention allegedly includes or the manner in which the boring set of Sears infringes upon the application for letters patent. Until letters patent are issued there is no prima facie cause of action for the alleged infringement thereof.

18. Paragraph 20 consists entirely of conclusions of the pleader; the name or names of the alleged supplier of Sears are not set forth, the manufacturing cost of the item to the [fol. 17] manufacturer is not set forth. There is no allegation in paragraph 20 that Time Saver Tools, Inc. purchases the boring set from the same manufacturer that Sears does. The allegations with reference to Sears' sale of the bits in said paragraph is a conclusion of the pleader and no facts are set forth to show the prices (either cost prices or sale prices) of either Sears or Time Saver Tools, Inc.

19. Paragraph 21 consists entirely of conclusions of the pleader and does not set forth the places where said alleged sales were made, the prices at which they were sold, nor does it allege that Time Saver Tools, Inc. was actively engaged in selling such tools in the same places where Sears sold them, or in what volume the same were sold either by Sears or by Time Saver Tools, Inc.

20. The allegations of paragraph 22 consist entirely of conclusions of the pleader. Its references to other suppliers and competitors are irrelevant and prejudicial. The allegations with reference to the alleged monopoly are entirely conclusions of the pleader and unsupported by any facts upon which such conclusions can be based. The allegations with reference to monopolizing interstate commerce engaged in by smaller companies are irrelevant conclusions of the pleader, and prejudicial.

21. The damages as claimed in paragraph 23 of the complaint do not flow from any causes of action properly pleaded or set forth in the complaint nor is any basis for injunctive relief shown.

22. Paragraph 3 of Count II of the complaint should be stricken as irrelevant and immaterial since the damages allaged are not properly referrable to the cause of action pleaded in this Count II.

23. Paragraph 2 of Count III should be stricken as no facts are alleged upon which to base the damages alleged therein.

24. Paragraph 2 of Count IV should be stricken as no facts are alleged upon which to base the damages alleged therein.

25. Paragraph 5 of Count V should be stricken as irrelevant and immaterial to any issue raised by the allegations of this Court V.

26. Paragraph 6 of Count V consists entirely of conclusions of the pleader.

27. Paragraph 2 of Count VI of the complaint consists [fol. 18] entirely of conclusions of the pleader and should be stricken.

28. Paragraph 3 of Count VI of the complaint consists of conclusions of the pleader and the allegations of damages contained therein bear no proper relation to the alleged wrongful conduct of defendant.

29. Paragraph 4 of Count VI of the complaint is a conclusion of the pleader and no facts are alleged to support this conclusion.

Leo H. Arnstein, Herbert E. Ruben, Attorneys for the Defendant.

Lederer, Livingston, Kahn & Adsit, Suite 1440—120 South LaSalle St., Chicago 3, Illinois. CEntral 6-3985.

(Original Not Signed)

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

ANSWER TO COUNT III OF THE COMPLAINT—Filed December 4, 1953

For answer to the allegations contained in Count III of the Complaint of the plaintiffs in the above entitled cause, Sears, Roebuck and Co., defendant, by its attorneys, says:

1. In answer to the allegations contained in paragraph 1 of said Count III, which allegations are incorporated by reference from other counts:

(a) Defendant denies the allegations contained in paragraph 1 of Count II;

(b) Defendant states that it has no knowledge or in-

formation sufficient to form a belief as to the truth of the averment contained in paragraph 2 of Count I;

(c) Defendant admits the allegations contained in paragraph 7 of Count I;

[fol. 19] (d) Defendant states that it has no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in paragraph 15 of Count I;

(e) Defendant denies each and every allegation contained in paragraph 16 of Count I.

2. Defendant denies the allegations contained in paragraph 2 of Count III.

Wherefore, the defendant prays judgment that Count III of the Complaint of the plaintiffs be dismissed with costs to the defendant.

Dated: Dec. 4, 1953.

(S.) Leo H. Arnstein, Herbert E. Ruben, Lederer, Livingston, Kahn & Adsit.

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

AMENDED MOTION OF DEFENDANT TO DISMISS THE COMPLAINT EXCEPT COUNT III THEREOF—Filed December 4, 1953

Now comes defendant, Sears, Roebuck and Co., by Leo H. Arnstein and Herbert E. Ruben, its attorneys, and moves the Court to dismiss the complaint heretofore filed, except Count III thereof, and for grounds of said motion shows to the Court the following:

1. Count I of the complaint fails to allege facts showing that any private harm plaintiffs may have suffered was incurred "by reason" of anything done by defendant in viola- [fol. 20] tion of the anti-trust laws, as required by Section 4 of the Clayton Act.

2. Count I of the complaint fails to state a cause of action under Section 1 of the Sherman Act in that no facts are alleged showing a contract or conspiracy in restraint of trade and no facts are alleged showing that defendant

has engaged in any conduct constituting an actionable restraint.

3. Count I of the complaint fails to state a cause of action under Section 2 of the Sherman Act in that no facts are alleged showing that defendant possesses the requisite market control, the requisite wrongful intent, or has engaged in the requisite wrongful acts required to show an attempt to monopolize or monopolization.

4. Count I of the complaint fails to state a cause of action under Section 3 of the Clayton Act in that said count only proscribes sellers or lessors and defendant was a purchaser under the arrangement in question. Further, no facts are alleged showing a substantial lessening of competition or a tendency toward monopoly as required by the Act.

5. Count I of the complaint fails to state a cause of action under Section 3 of the Robinson-Patman Act with respect to plaintiff's lamp business, since plaintiff was not a competitor of the defendant within the meaning of that statute.

6. Count I of the complaint fails to state a cause of action under Section 3 of the Robinson-Patman Act with respect to plaintiff's tool business in that the complaint has merely parroted the language of the statute without alleging any facts showing the time, place or circumstances constituting unlawful price cutting and without alleging facts showing that plaintiff was a direct competitor of defendant as required by the statute.

7. Count II of the complaint fails to state any common law cause of action with respect to plaintiff's lamp business in that no facts are alleged stating a cause of action for breach of contract. No common law cause of action is stated for unfair competition since no facts are alleged showing that plaintiff's lamp design had acquired a secondary meaning. The allegations as to defendant's alleged predatory price cutting do not state a cause of action since price cutting is not an actionable wrong at common law.

[fol. 21] 8. Count IV of the complaint fails to state any cause of action with respect to plaintiff's tool business. No cause of action is stated for patent infringement since from the face of the complaint it appears that plaintiff only has a patent application. No cause of action is stated for unfair competition since plaintiff fails to allege facts

necessary to establish secondary meaning in his tools nor are there any allegations that defendant has palmed off its tools as those of plaintiff's. Plaintiff only alleges conclusions of law with respect to alleged predatory price-cutting and in any event price cutting is not actionable at common law.

9. Count V of the complaint fails to state a cause of action under Section 2(f) of the Robinson-Patman Act in that plaintiff fails to allege that defendant received a discriminatory price with knowledge that such price was not justified by cost differentials and plaintiff further fails to allege that the tools sold to defendant were of like grade and quality as the tools sold to plaintiff.

10. County VI of the complaint is repetitious of Counts II, III and IV and should be stricken.

(S.) Leo H. Arnstein, Herbert E. Ruben, Attorneys for Defendant, Sears, Roebuck and Co.

Lederer, Livingston, Kahn & Adsit.

[fol. 22] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM—Filed May 12, 1954.

The issues in this case arise on the defendant's motion to dismiss the complaint, except Count III, to which an answer has been filed.

The complaint is brought by Bruce Mackey and Time Saver Tools, Inc., a corporation, against Sears, Roebuck & Co. and consists of six Counts.

Count V is brought under Section 2(f) of the Robinson-Patman Act (15 U. S. C. Sec. 13(f)) interdicting the receipt of a prohibited price discrimination. This Count is admittedly deficient under Automatic Canteen Co. v. Federal Trade Commission, 346 U. S. 61, decided since the complaint was filed.

Count I presents a claim for treble damages under the anti-trust laws and Counts II, IV and VI aver common law causes of action. The statutory and the common law claims will be considered separately.

The Claim for Treble Damages—Count I

This Count is brought on behalf of Mackey alone and purports to charge conduct offending Sections 1 and 2 of [fol. 23] the Sherman Act and Section 3 of the Robinson-Patman Act (U. S. C, Secs. 1, 2, 13(a)). The factual allegations are as follows:

(a) Mackey, as sole surviving stockholder, succeeded to the ownership of all of the rights of two "Metalcraft" corporations, since dissolved, which were engaged in the interstate business of making and selling nursery lamps. (Par. 3)

(b) The plaintiff Time Saver Tools, Inc., is engaged in the interstate business of manufacturing and selling tools. All of its stock is owned by Mackey. (Par. 5)

(c) Sears is engaged in general retail merchandising, selling nursery lamps and tools, among other items. It is the largest mail order company in the world and additionally operates over 700 retail stores in the United States and some foreign countries. The business of Sears is interstate. Its sales are presently at a rate of over $2,900,000,000 yearly. The "tremendous volume" of Sears gives it power to destroy the business and property of its small competitors and suppliers through refusals to deal with such suppliers or through the actual or threatened use of unreasonably low prices. Sears has used its power "to discipline and punish suppliers" with the specific intent to injure and destroy potential competitors who made purchases from such suppliers. The exercise of such power constitutes an intent to monopolize a part of interstate trade and has the effect of unreasonably restraining competition among suppliers and of coercing suppliers of Sears to deal with it on Sears' terms. (Par. 8-10)

(d) Beginning in 1949 Sears has engaged in a continuing attempt to destroy every business in which Mackey was engaged in order to punish him for his refusal to deal on

Sears' terms and to restrain others from similar refusals. (Par. 11)

(e) In 1946 Sears by threatening to discontinue its purchases caused Metalcraft to sell its nursery lamps exclusively to Sears. (Par. 12)

(f) In 1949 Sears notified Mackey that it would not accept 30,000 nursery lamps which Metalcraft was under contract to supply unless the price was reduced 20% declaring that if the reduction were refused Sears would ruin Mackey [fol. 24] and Metalcraft. (Par. 13)

(g) Mackey declined to accede to the price reduction and thereupon attempted to sell the nursery lamps through department stores in Milwaukee and Detroit. With the intent of despoiling Mackey's plans, Sears sent substantial quantities of the Metalcraft lamps, for which it had paid $2.20 apiece, for sale in Milwaukee and Detroit at 94¢, though not in other comparable cities. At the same time Sears listed the lamps in two of its catalogs at 84¢ apiece, supplying a cheap imitation of the Metalcraft lamps "to persons ordering from Sears' catalog representation of Metalcraft's lamp." As a direct result of such conduct, Metalcraft became insolvent and was dissolved. (Par. 14)

(h) In October, 1952, while Mackey was engaged in selling tools for Vascoloy, Sears caused Vascoloy to discharge Mackey under the threat of refusing to make further purchases from customers of Vascoloy. (Par. 15, 16)

(i) Time Saver was formed to manufacture and sell certain new type tools devised in part by Mackey. Through national advertising such tools became identified with Time Saver in the market. (Par. 17)

(j) Sears is presently purchasing and selling tools which are copies of the tools developed by Mackey in plastic cases which are copies of the cases used by Time Saver. The Sears case contains the same legend and design on its display surface but the words "Craftsman" and "Sears, Roebuck and Co." are substituted for the words "Time Saver Tools, Mundelein, Ill." Sears' purpose is to appropriate the market for the tools and at the same time to destroy Mackey. With respect to certain tools, Sears' conduct continued notwithstanding notice of Time Saver's patent application and despite knowledge that Sears' copies in-

fringe on the invention embodied in the patent application (Par. 18, 19)

(k) Through promises of future business Sears has been able to purchase tools from Time Saver's supplier at prices lower than the price charged Time Saver and has sold the tools below manufacturing cost for the purpose of appropriating the market and destroying Time Saver. (Par. 20)

[fol. 25] (l) Sears has sold tools in some parts of the United States at prices lower than others for the purpose of destroying competition from Mackey or Time Saver. (Par. 21)

(m) The described practices were undertaken by Sears in order to destroy Mackey and constitute an attempt to monopolize interstate commerce engaged in by Mackey and small companies making sales to Sears or which would be competitors of Sears in the retail market.

As a result of the alleged injustices, Mackey demands treble damages in the amonat of $570,000, together with incidental and injunctive relief. Time Saver does not join in the prayer for relief under this Count.

Discussion of the Sherman Act

So far as the Sherman Act is concerned, it is implicit in the plaintiff's brief that only a Section 2 violation is urged. No reliance is placed on Section 1. This is inevitable, since there is no charge of combination or conspiracy among distinct legal *entities* having separate economic motives, personal to themselves, which is an indispensable requisite for a Section 1 violation.

Times-Picayune *v.* United States, 345 U. S. 594, 626;
Timken Roller Bearing Co. *v.* United States, 341 U. S. 593, 598, 606;
Nelson Radio & Supply Co. *v.* Motorola, 200 F. 2d 911, 914 (C. C. A. 5th Circ. 1952);
United States *v.* Yellow Cab Co., 332 U. S. 218, 227.

To justify a suit for treble damages (15 U. S. C. Sec. 15), two conditions must concur. The plaintiff must establish (a) a violation of the anti-trust laws and (b) injury to the

plaintiff proximately resulting from the established violation.

Goodman & Son *v.* United Lacquer Mfg. Corp., 81 F. Supp. 890 (D. C. Mass. 1949);
Sunbeam Corporation *v.* Payless Drugstores, 113 F. Supp. 31 (D. C. Cal. 1953);
Nelson Radio & Supply Co. *v.* Motorola, supra.

[fol. 26] The Sherman Act decries conduct unreasonably restricting competition in the public market and a charge of transgressing the statute necessarily involves a public evil as distinguished from a purely private wrong.

Neumann *v.* Bastian-Blessing Co., 70 F. Sup. 447 (D. C. Ill. 1947; LaBuy, D. J.).

The factual requirements for a civil suit are no less severe than the requirements for a criminal indictment. Plaintiff argues that it is absurd to suggest that the public has no interest in an individual who is being deliberately destroyed. Assuredly the thought is valid but it serves no purpose in enlarging the scope of the statute.

Our initial task, therefore, is to determine whether Count I sufficiently describes an offense under Section 2 of the Sherman Act.

Rule 8(a) prescribes that a complaint shall include "a short and plain statement of the claim showing that the pleader is entitled to relief" to which is added the direction that each averment "shall be simple, concise and direct." While a cause of action need not be stated with the technical accuracy and completeness required at common law, the pleading must make it evident, at least in a practical way, that the pleader is entitled to relief.

Commercial Banking Corp. *v.* Indemnity Insurance Company of North America, 1 F. R. D. 380 (D. C. Pa. 1940)

The broad tolerance of the Rules does not extend to justify the allegation of a claim in the words of a statute and this is especially true in the case of a statute like the Sherman Act which defines a social and economic offense in terms of a

general principle without specific tests to aid in its application.

> Louisiana Farmers' Protective Union *v.* Great Atlantic and Pacific Tea Co., 131 F. 2d 419 (C. C. A. 8th 1942).

The degree of definition required in alleging ultimate facts varies from one type of case to another, but invariably enough of a factual nature related to the specific occurrences constituting the claim must be included to indicate that a cause of action is at least potentially present. Unless this test is met, the conduct of a trial would be a pointless waste of time.

[fol. 27] The problem, therefore, is whether Count I, viewed in this liberal aspect, states a case within Section 2 of the Sherman Act.

Section 2 has a dual aspect. It condemns both the act of monopolizing and an attempt to monopolize. As support for the monopoly charge, the complaint alleges that the defendant Sears is engaged in general retail merchandising, selling among other items nursery lamps and tools, and that its current annual business exceeds $2,900,000,000. These allegations are manifestly insufficient to establish monopoly or monopoly power.

In United States *v.* Columbia Steel Company, 34 U. S. 495, 527, the Court said:

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is of itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed.

> United States *v.* United Shoe Machinery Corp., 110 F. Supp. 295 (D. C. Mass. 1953).

In the instant case there is no statement as to Sears' volume in the nursery lamp and tool business, either nationally or locally, or any factors relating to the opportunities of the public to purchase in a free and unrestrained market. Sears' volume in other fields is clearly irrelevant. There is no factual statement showing that the predatory practices complained of have to the slightest extent lessened competition in the field of activity in which the plaintiff was engaged. The effectiveness of exclusionary practices employed against a single competitor cannot be held to be monopolization where others in the same field are numerous and active. The destruction of the plaintiff alone would in no sense deprive other com-[fol. 28] petitive entities of their market or affect the public to any measurable extent.

Neumann *v.* Bastian-Blessing Co., supra.

The other aspect of Section 2 which has pertinency is the interdiction of an "attempt to monopolize." The classical definition of Mr. Justice Holmes is immediately pertinent. In Swift & Co. *v.* United States, 196 U. S. 375, 396, he said:

> "The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happpen. Commonwealth *v.* Peaslee, 177 Massachusetts 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

This definition has received recent approval.

Lorain Journal *v.* United States, 342 U.S. 143, 153.

Since the complaint makes no showing that Sears had achieved an actual monopoly or had attained monopoly power in the field and in the area in which the plaintiff was engaged, it becomes pertinent to inquire whether the predatory practices described coupled with the economic strength possessed by Sears imply "an intent to monopolize a part of interstate trade" and afford evidence of a dangerous probability that a monopoly will ultimately be accomplished. The complaint can be searched in vain for any factual or near factual allegations that bring any such conviction to the mind.

Specifically the defect in the complaint is the absence of any causal connection between the destruction of the plaintiff and his corporations and the disciplining of Sears' sup-
[fol. 29] pliers on the one hand, and the elimination or degrading of general competition in the areas of business in which Sears and the plaintiff had a common interest on the other hand. The actions taken to ruin the plaintiff and discipline suppliers may be reprehensible but there is not the slightest showing of impending monopoly other than the bare assertion of the pleader.

It is true that an offensive monopoly need not be nation-wide. It may indeed embrace only a small locality. As stated by Mr. Justice Reed in United States *v.* Columbia Steel Co., 334 U. S. 495, 519:

> "The Sherman Act is not limited to eliminating restraints whose effects cover the entire United States. We have consistently held that where the relevant competitive market covers only a small area the Sherman Act may be invoked to prevent unreasonable restraints within that area."

United States *v.* Yellow Cab Co., 332 U. S. 218.

Gamco Inc. *v.* Providence Fruit & Produce Co., 194 F. 2d 484 (C. C. A. 1st 1952), where the monopoly operated within the confines of a single building.

However, the charge that Sears undersold the plaintiff in Milwaukee and Detroit is not sufficient to establish any destructive effect on the competition in those areas or any exclusionary practices.

Price cutting in itself is not inherently unlawful.
Schine Theatres v. United States, 334 U. S. 110, 120.

There is no charge that Sears and the plaintiff were the only vendors of nursery lamps in the two cities or any allusion to the financial strength or weakness of any other competitors who may have been engaged in those markets, or indeed any other allegations descriptive of a competitive situation in which the public interest was involved. All of the factual allegations emphasize the plaintiff as the primary object of Sears' destructive intent.

Both sides converge upon United States v. New York Great Atlantic and Pacific Tea Company, 67 F. Supp. 626 (D. C. Ill. 1946), affirmed 173 F. 2d 79, as being the most closely related decision. The defendant asserts that this case stands alone as sustaining a monopoly charge where [fol. 30] no dominating control of the market was proved, yet defendant offers no citations to authoritative cases where the decision has been criticized, limited or rejected. It is not necessary to justify this decision, although it is easily defensible and undoubtedly sound. So far as the case relates to Section 2 of the Sherman Act, it was presented to the court as an attempt to create a partial monopoly and a conspiracy between the principal defendant and its associated companies was charged. There was no contention that an actual monopoly had been accomplished and therefore the decision was based upon a different aspect of Section 2 from the group of cases, stressed by the defendant, in which the Supreme Court has measured the percentage of the business transacted by the offending corporation in the particular field of competition. The court found that where, in spite of a declaration of innocence of purpose the "conscious acts of a group are such as inevitably to work undue restraint of trade or a monopoly, in whole or in part, the actors thereby bring about transgression of the congressional rule of conduct." (p. 676 Emphasis supplied.) The court concluded that A. & P.'s plan of action consisting of numerous and divers restrictive practices inevitably and inherently tended to restrain trade and create a partial monopoly. Even though some one or all of the acts of A. & P. standing alone might not amount to a violation of law, "when coupled and inextricably interwoven with the activities of

Acco, (such actions) reflects inevitably the misuse of defendants' power in competition with others to such an extent as to create undue interference with commerce—undue restraint of trade—of such a character as to result in monopoly."

The separate and successive acts of the defendant factually recited in the first Count were invariably directed toward the elimination of the plaintiff alone, and therefore bear no real analogy to the impairment of the public interest proved in the A. & P. case.

The charge of the Sherman Act violation cannot be sustained.

The Claim Under Section 3 of the Robinson-Patman Act (15 U. S. C. 13-(a))

The second anti-trust violation seriously urged is an offense under Section 3 of the Robinson-Patman Act. So far as pertinent, this section provides:

> [fol. 31] "'It shall be unlawful for any person * * * to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lesson competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

The pertinent allegations of the complaint are:

> (a) Paragraph 14. Sears sent lamps which it had purchased from Metalcraft to Milwaukee and Detroit, though not to other comparable cities, for sale below cost.
>
> (b) Paragraph 20. Sears induced suppliers of lathe bits to sell the bits to Sears at prices lower than the prices charged Time Saver.
>
> (c) Paragraph 21. Sears sold tools in some parts of the United States at lower prices than elsewhere for the purpose of destroying competition from Mackey or Time Saver.

In the light of what has been said under the discussion of the Sherman Act, the only clause of Section 3 of the Robinson-Patman Act which is significant here is that which specifies that price discrimination is unlawful if it tends to injure, destroy or prevent competition with the person or grants or receives the benefit of the discrimination or with the customers of either. To succeed plaintiff must bring himself within the defined area of competition in order to show that he has been injured as a result of an infraction of the section.

Goodman & Son *v.* United Lacquer Mfg. Corp., supra.
Nelson Radio & Supply Co. *v.* Motorola, supra.
Sunbeam Corporation *v.* Payless Drug Stores, supra.

Manifestly Mackey was not a person who granted or received any price concession of a customer of Sears or its customers. This disposes of the allegations in Paragraphs 14 and 21 with finality.

The charge in Paragraph 20 that the common supplier of [fol. 32] lathe bit sets to Sears and Mackey sold to Sears at a lower price than Time Saver is irrelevant since Time Saver is not a party plaintiff to Count I. Further, the supplier of the bits—not Sears—is the offender described by the statute, and if any such cause of action is sustainable the supplier should necessarily be joined as a primary party defendant. Finally, the emasculated allegations of Section 20 hardly conform even to the simple requirements of Rule 8.

Count II—Common Law Cause of Action

Mackey is the sole party plaintiff in Count II. Plaintiff seeks to justify this Count as a common law action for the intentional and deliberate destruction of the plaintiff's businesses, accomplished through a planned program which, the plaintiff says, must be considered as a connected whole. The action, therefore, sounds in tort.

The substantial facts alleged are (1) Sears induced Metalcraft to sell its nursery lamps to Sears exclusively, (2) Sears refused to accept lamps which Metalcraft was under contract to supply Sears and demanded price reductions under threat that Sears would ruin Mackey and Metal-

craft if the reduction were refused, and (3) Sears sold Metalcraft the lamps below cost in Milwaukee and Detroit constituting markets which Metalcraft was attempting to develop.

A corporation has the right to select its customers and to refuse to sell its products for any reason whatsoever.

Times-Picayune *v.* United States, supra.
Nelson Radio & Supply Co. *v.* Motorola, supra.

The right arbitrarily to refuse to deal with or purchase from anyone should be equally immune from attack or criticism.

Price cutting is not inherently unlawful.

Schine Theatres *v.* United States, supra, at 120.
United States *v.* New York Great Atlantic & Pacific Tea Co., supra, at 642.

[fol. 33] No fraudulent practices are alleged. The sole impropriety charged is that Sears notified Mackey he would be ruined if he refused to accede to a price reduction. Such purpose not identifiable in some objective way with acts which are in and of themselves lawful does not render the conduct actionable.

Count IV—Common Law Action for Unfair Competition

This Count is brought by Time Saver as the sole plaintiff. The essence of the charge is that Sears was guilty of unfair competition in that it copied unpatented tools (applications for patents were pending) and the case in which the tools were presented to the public which were designed and offered for sale by Time Saver, the words "Craftsman" and "Sears, Roebuck & Co." were imprinted on the package offered to the public by Sears.

Suffice it to say that the complaint contains no allegations from which it could be concluded that any reasonably intelligent and alert member of the public was deceived into purchasing Sears' tools believing they were the products of Time Saver.

Plaintiff relies upon several cases of which Quaker Oats Co. *v.* General Mills, Inc., 134 F. 2d 429, decided in this Circuit is typical. Two excerpts from Judge Minton's opin-

ion make it unmistakably clear that the claimed cause of action cannot be sustained. At Page 431 the court said:

> "The plaintiff was bound to use reasonable care in the marketing of its product to see that the public was informed of the source thereof, and to so identify its product as to make it readily distinguishable from the defendant's product."

And again at Page 432

> "The plaintiff, in marketing its goods, is not bound to make them 'foolproof' so that no one can make a mistake in regard thereto.".

Unless it were shown that the plaintiff's product had acquired a secondary meaning identifying the product with the plaintiff, there would be no basis for asserting that the public was misled even though the package and its contents offered by Sears were identical with that of Time Saver. Count IV is also deficient in this respect.

[fol. 34] Count VI—Omnibus Count at Common Law

This Count is brought by Mackey alone. In effect it duplicates all of the preceding Counts except Count I and charges the practices of Sears were performed in furtherance of its plan to destroy Mackey and his businesses. In view of the position herein expressed on Counts II, IV and V, obviously most of the allegations are superfluous and at best background or evidentiary material. The defendant concedes that that portion of Count VI which duplicates Count III is sustainable. The defendant has sought the elimination of neither Count III or Count VI on the basis of duplication. No charge or prejudice to the defendant, if both Counts are permitted to stand, has been urged and none is perceivable. Under these circumstances and in view of this court's liberal attitude on questions of pleadings, the motion to strike Count VI is denied.

The Problem as to Whether an Amendment Should Be Allowed

This case has been argued extensively and with great skill. There is nothing in the pleading to indicate that

any supplemental allegations would establish a monopoly or monopoly power by Sears in the field and localities in which the plaintiff conducted his several businesses, or that the alleged wrongful practices of Sears affected the open and public market in such a way as to lay a foundation for a supportable charge of an attempt to monopolize. In respect to Section 3 of the Clayton Act the circumstances recited do not coincide with the requirements of the law. Therefore, leave to amend the complaint under the anti-trust laws will be denied.

The allegations of Count II are not suggestive of practices a fuller or correct statement of which would constitute a cause of action, and therefore leave to amend in respect to this claim will be denied.

As to Count IV, the situation is somewhat different. Supplementing the Count with allegations showing that the lathe bit package had become identified with Metalcraft in the public mind and that the Sears package deceptively [fol. 35] the same, notwithstanding the imprint of Sears' own trade name, would supply the existing deficiencies, and therefore leave to amend the claim for unfair competition would be in order.

In net, Counts I, II, IV, and V will be striken with leave to amend Count IV and without leave to amend Counts I, II and V.

Counsel will confer and present a draft order not inconsistent with the views herein expressed within five days from the date hereof.

Julius J. Hoffman, Judge

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

May 13, 1954

Chambers of Judge Julius J. Hoffman

MEMORANDUM—Filed May 13, 1954

Counsel for the defendant have called the Court's attention to the inadvertent quotation of Section 13 instead of [fol. 36] Section 13a, Title 15, U.S.C., appearing on page 9 of the memorandum filed by the Court on May 12, 1954. The memorandum is therefore amended to provide for the substitution of Section 13a for Section 13, as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Julius J. Hoffman, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

ORDER AND JUDGMENT—May 19, 1954

This cause coming on to be heard upon defendant's amended motion to dismiss the complaint, except Count

III thereof, to which an answer has been filed, the mat-
[fol. 37] ter having been argued extensively in written briefs, the Court having filed its Memorandum on May 12, 1954, as amended by Memorandum of May 13, 1954, and being fully advised in the premises, hereby finds and concludes:

1. Count I of the Complaint fails to state a claim upon which relief can be granted, and fails to conform to the requirements of Rule 8 of the Rules of Civil Procedure for the United States District Courts; an amendment to Count I would not enable the plaintiff to lay a foundation for a supportable claim for relief under the statutes on which plaintiff relies, and accordingly there is no just reason for delaying the final determination of the legal issues raised by defendant's amended motion to dismiss insofar as it is directed at Count I;

2. Count II fails to state a claim upon which relief can be granted; the allegations of Count II are not suggestive of practices a fuller or correct statement of which would constitute a cause of action, and accordingly there is no just reason for delaying the final determination of the legal issues raised by defendant's amended motion to dismiss insofar as it is directed at Count II of the complaint;

3. Count IV of the complaint fails to state a claim upon which relief can be granted; the existing deficiencies in Count IV could be eliminated by amendment;

4. Count V of the complaint fails to state a claim upon which relief can be granted;

5. Count VI of the complaint states a claim upon which relief can be granted insofar as it duplicates Count III;

Wherefore, It Is Hereby Ordered:

1) The amended motion of the defendant to strike Counts I, II, IV and V of the Complaint, is hereby sustained and said Counts are hereby stricken;

2) Plaintiff is hereby granted leave to file an amended Count IV of the Complaint within 20 days from this date.

3) The amended motion of the defendant to strike Count VI of the Complaint is hereby denied insofar as said Count VI realleges the allegations contained in Count III of the plaintiffs' Complaint; the remaining allegations of Count VI are hereby stricken and the defendant is

ordered to answer that portion of Count VI not stricken by this order within 20 days from this date.

4) Leave to amend Counts I, II and V of the Complaint [fol. 38] is hereby denied; as to said Counts, the suit be and the same is hereby dismissed on the merits, judgment be and the same is hereby entered against the plaintiffs and the defendant may go hence without day.

Dated: May 19, 1954.

Enter: Julius J. Hoffman, Judge.

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed June 8, 1954

Notice Is Hereby given that Bruce A. Mackey and Time Saver Tools, Inc., a corporation, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the Order and Judgment entered in this action on May 19, 1954.

(S) Edward I. Rothschild, John Paul Stevens, Norman J. Barry, Attorneys for Appellants, Bruce A. Mackey, and Time Saver Tools, Inc.

[fol. 39] Rothschild, Stevens & Barry, 120 South La Salle Street, Chicago 3, Illinois

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Certificate of mailing (omitted in printing)

Cost Bond on Appeal for $250.00 filed June 7, 1954, omitted in printing.

[fol. 40] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

APPELLANT'S STATEMENT OF POINTS—Filed June 8, 1954

Appellants, Bruce A. Mackey and Time Saver Tools, Inc., plaintiffs, upon their appeal to the United States Court of Appeals for the Seventh Circuit from the order entered in this cause on May 19, 1954, intend to rely upon the following points:

1. The District Court erred in making and entering the order appealed from dated May 19, 1954.

2. The order appealed from was not authorized, justified, or warranted by law or by the record before the Court.

3. The District Court erred in finding that Count I of the complaint fails to state a claim upon which relief can be granted.

[fol. 41] 4. The District Court erred in finding that Count I of the complaint fails to conform with the requirements of Rule 8 of the Rules of Civil Procedure for the United States District Courts.

5. The District Court erred in finding that an amendment to Count I would not enable the plaintiff to state a supportable claim for relief under the antitrust laws.

6. The District Court erred in finding that Count II fails to state a claim upon which relief can be granted.

7. The District Court erred in finding that Count IV of the complaint fails to state a claim upon which relief can be granted.

8. The District Court erred in finding that Count V of the complaint fails to state a claim upon which relief can be granted.

9. The District Court erred in sustaining the amended motion of the defendant to strike Counts I, II, IV, and V of the complaint and in ordering said counts to be stricken.

10. The District Court erred in ordering that the allegations in Count VI, except insofar as they reallege the allegations contained in Count III of the complaint, be stricken.

11. The Court erred in denying leave to amend Counts I, II and V of the complaint.

12. The Court erred in entering judgment against two plaintiffs on Counts I, II and V of the complaint.

(S) Edward I. Rothschild, John Paul Stevens, Norman J. Barry, Attorneys for Appellants.

Certificate of service (omitted in printing)

[fol. 42] Appellants' designation of contents of record on appeal (omitted in printing).

[fol. 43] Proof of service (omitted in printing).

[fol. 44] And afterwards on, to wit, the 17th day of July 1954 came the Defendant, Appellee by it attorneys and filed in the Clerk's office of said Court its certain Appearance in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT

APPEARANCE—Filed July 17, 1954

Now comes Sears, Roebuck and Co., a corporation organized under the laws of the State of New York, and in compliance with paragraph 3 of rule 10 of the United States Court of Appeals for the 7th Circuit, states that it is the appellee in the above captioned cause and that its attorneys are Leo H. Arnstein, Herbert E. Ruben, and Lederer, Livingston, Kahn & Adsit, whose addresses are Suite 1440, 120 South LaSalle Street, Chicago 3, Illinois.

Sears, Roebuck and Co., By L. H. Arnstein, Herbert E. Ruben, Lederer, Livingston, Kahn & Adsit.

[fol. 45-46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47-48] IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11225

BRUCE A. MACKEY, Plaintiff-Appellant

vs.

SEARS, ROEBUCK & Co., a New York Corporation, Defendant-Appellee

MOTION TO DISMISS—Filed November 15, 1954

Now Comes Defendant-Appellee, Sears, Roebuck & Co., a corporation, by Leo H. Arnstein and Herbert E. Ruben, its attorneys, and moves the Court as follows:

(1) To dismiss the appeal taken herein for lack of a final and appealable order meeting the requirements of Title 28 U.S.C.A. Sec. 1291.

(2) In the event that this Court should not grant Paragraph (1) of this Motion, to extend the time for Appellee to file its Brief on this appeal to thirty (30) days after the Order of Court is entered denying Paragraph (1) of this Motion.

(4) In any event, to postpone oral argument on the within appeal until the January, 1955, Session of this Court.

In support of this Motion, the attached Memorandum of Law and Affidavit are made a part hereof.

Leo H. Arnstein, Herbert E. Ruben, Attorneys for Sears, Roebuck & Co., Defendant-Appellee.

[File endorsement omitted.]

[fol. 49] IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11225

BRUCE A. MACKEY, Individually and TIME SAVER TOOLS, INC., an Illinois Corporation, Plaintiffs-Appellants,

vs.

SEARS, ROEBUCK & Co., a New York Corporation, Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

OPINION—January 18, 1955

Before DUFFY, Chief Judge, MAJOR and SWAIM, Circuit Judges.

DUFFY, Chief Judge. The complaint herein containing six counts was filed by two plaintiffs, Bruce A. Mackey, an individual, and Time Saver Tools, Inc., a corporation, which was wholly owned by Mackey. They will hereinafter be referred to as plaintiff. The complaint alleged that since 1949 Sears had directed a course of predatory conduct successively at three business ventures carried on by plaintiff: (1) by localized price-cutting, it destroyed his lamp business; (2) by use of threatened boycott, induced a breach of plaintiff's contract for commissions with "Vascoloy", and (3) is attempting to destroy his tool business by means of unfair competition.

Count 1 alleges a deliberate and announced plan by Sears to destroy plaintiff's business activities, and that such a plan is violative of the Sherman Act and § 3 of the Robinson-Patman Act. In this count, plaintiff seeks treble damages and equitable relief under the Clayton Act. Counts 2, 3 and 4 are common law counts. In count 2 plaintiff seeks damages for the intentional destruction of [fol 50] his lamp business. In count 3 plaintiff seeks damages for defendant's inducement of the breach of his commission contract with "Vascoloy". In count 4 plaintiff seeks damages for unfair competition. Count 5 was a claim

by Time Saver under § 2(f) of the Robinson-Patman Act. However, this count was abandoned by plaintiff after the decision by the Supreme Court in *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61. Count 6 alleges defendant's entire predatory program was actionable under common law.

Defendant moved to dismiss the entire complaint. Later, defendant filed an answer to count 3 together with an amended motion to dismiss the balance of the complaint. The District Court ordered counts 1 and 2 to be stricken without leave to amend, and found that there was no just reason for delaying the final determination of the issues raised by these counts, and directed that judgment be entered thereon against plaintiff. The Court also struck count 4 but granted plaintiff leave to amend, which was done, and this count is now at issue. The Court struck all of the allegations of count 6 except the portion which realleged the facts covered by Count 3.

Plaintiff appeals from the order and judgment dismissing portions of the complaint without leave to amend. The appeal, in effect, challenges the holding of the District Court that the facts alleged in Counts 1 and 2 do not state, and could not be amended to state, a claim upon which relief can be granted.

Defendant moved to dismiss the appeal on the ground that the order and judgment appealed from is not a final or appealable order under the requirements of § 1291, Title 28, U.S. Code. This section provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *." Certain exceptions to this rule provided in § 1292 are not here applicable.

Because of the importance of the questions raised by the motion to dismiss the appeal, we set the motion down for oral argument after briefs had been submitted. In deciding whether the District Court entered a final decision, we must interpret Rule 54(b), Federal Rules of Civil Procedure.

[fol. 51] Prior to September 1, 1938, the effective date of the Federal Rules of Civil Procedure, the order in this case would not have been appealable, because it did not dis-

pose of all of Mackey's claims against Sears. *Collins* v. *Miller*, 252 U.S. 364. As originally adopted, Rule 54(b) authorized the entry on one claim in a multiple claim suit, when the issues material to that claim and all counterclaims arising out of the same transaction or occurrence had been determined. The validity of the rule in its original form was upheld in *Reeves* v. *Beardall*, 316 U.S. 283.

Amended Rule 54(b) provides: "*Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims, shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

A conflict has arisen among the various courts of appeals as to the effect to be given to this rule. We find the First and Third Circuits lined up on one side holding generally that where an order has been entered by a district court judge, where, as was done in the case at bar, he makes a "determination",[1] jurisdiction is automatically and conclusively conferred upon the courts of appeals to hear the appeal. However, the Second Circuit and the Court of Appeals of the District of Columbia have reached a contrary conclusion, holding, in effect, that the courts of appeals are required to make an independent determination as to whether the order in question was, in fact, a final order. This Circuit has not previously passed directly on the question, although there was discussion of the effect of the amended rule in *Winsor* v. *Daumit*, 179 F. 2d 475.

[1] The term "determination" includes "the express determination that there is no just reason for delay" and also the "express direction for the entry of judgment."

The first case to discuss the proper interpretation to be given to Rule 54(b) as amended was *Pabellon v. Grace Line, Inc.*, 2 Cir., 191 F. 2d 169. The panel considering [fol. 52] this case was Judges Chase, Clark and Frank, Judge Clark writing the opinion for the Court. It was held that an order dismissing a third party complaint was an appealable order where the district court had complied with the requirements of Rule 54(b). The Court agreed that the appeal taken in that case would have been proper even prior to the amendment of Rule 54(b), but Judge Clark stated that the district court, by making a determination that there was no just cause for delay and that he was entering a final order under Rule 54(b) relieved the Court of Appeals from the task of making an independent analysis to determine whether or not the order was, in fact, final and appealable. Judge Frank, in a concurring opinion, took issue with Judge Clark's interpretation of Rule 54(b) stating that such an interpretation would render the rule invalid as beyond the statutory power of the Supreme Court.

Eight days after the decision of the Second Circuit in the *Pabellon* case, another panel of that court consisting of Judges Swan, Augustus Hand and Learned Hand, in *Ehrgenheimer v. General Mills*, 191 F. 2d 237, held in accordance with the view previously expressed by Judge Frank in the *Pabellon* case. The Court held that no appealable order had been entered, and decided that it was the duty of the appellate court to determine its own jurisdiction and that such jurisdiction could not be controlled by the finding of a district court judge. Thereafter, in *Sopinsky v. Hertz Drive-UR-Self Systems, Inc.*, 194 F. 2d 424, Judge Clark vigorously defended the view that he had previously expressed in the *Pabellon* case.

The same question came before the Court of Appeals of the Third Circuit in *Bendix Aviation Corp. v. Glass*, 195 F. 2d 267. In that case a counterclaim was dismissed and the District Court made the requisite "determination" under Rule 54(b) that there was no just reason for delay and that final judgment be entered. The case was finally heard before the entire court sitting *en banc*, and it was held, with two judges dissenting, that the effect of Rule

54(b) was to render conclusive insofar as the jurisdiction of the court of appeals was concerned, the finding of the district judge that a final appealable order was being entered. Shortly thereafter the Court of Appeals for the First Circuit, in *Haston Medical Supply Co. v. Lea & Febiger*, 195 F. 2d 853, in an opinion by Chief Judge Magruder, stated that the First Circuit was in full agree- [fol. 53] ment with the opinion of the Third Circuit in *Bendix Aviation Corp. v. Glass, supra*. More recently the Court of Appeals for the District of Columbia in *Gold Seal Co. v. Weeks*, 209 F. 2d 802, in an opinion by Chief Judge Stephens, followed the rule laid down by the Second Circuit in the *Flegenheimer* case.

Thus we find not only courts of appeals of two circuits opposing the view adopted by the courts of appeals of two other circuits, but we find panel opposed to panel in the Second Circuit and a vigorous dissent by two judges in the Third Circuit. Also, Professor Moore strongly espouses the views of Judge Clark insisting that such views properly reflect the intent of the draftsmen of the 1948 amendment to Rule 54(b). *Moore's Federal Practice*, (Second Edition, 1953), Vol. 6, pp. 228-230. It is of interest to note that Professor Moore was active in formulating and drafting the amended rule (*Pabellon v. Grace Line, Inc.*, 191 F. 2d 169, 173) and, of course, Judge Clark was the reporter of the Advisory Committee which recommended the amended rule to the Supreme Court.

It would seem that the Supreme Court should promptly decide the important question here at issue in order to reconcile the divergent and conflicting views which have developed among and within the circuits. The question is constantly recurring. An early decision by the Supreme Court would be most helpful.

The Second and District of Columbia Circuits have adopted a negative approach in interpreting the rule. They say that if, in a multiple claim suit, a trial judge fails to enter a "determination", then, although otherwise the order would have been appealable under § 1291 it remains interlocutory and non-appealable; that thus interpreted the rule does not alter the jurisdiction of the appellate courts as fixed in §§ 1291 and 1292. They argue further

that the jurisdiction of a court of appeals cannot rest on a district court's decision as to whether or not he will enter a "determination" described in Rule 54(b).

We think the interpretation announced by the First and Third Circuits is correct. We feel certain that such was the understanding of the Advisory Committee as so well stated by Judge Clark and Professor Moore. We find ourselves in agreement with the following statement in the opinion of the *Bendix Aviation Corp.* case, 195 F. 2d 267, 269, 270: "* * * We read that rule, as embodied in [fol. 54] amended Rule 54(b), to be that in a multiple claims case the judgment which finally adjudicates all the claims is the only judgment having finality unless the district court in the exercise of its discretion expressly determines that there is no just reason for delay with respect to the entry of a final judgment upon a particular claim in the action and accordingly expressly directs the entry of a final judgment adjudicating that claim. In such case the rule says that 'the court may direct the entry of a final judgment.' This is language of grant not of restriction and it requires that the judgment thus entered on a single claim is to be regarded as just as final, so far as further revision by the district court is concerned, as though the claim thus adjudicated were the sole claim for relief embodied in a wholly independent action. For when such a judgment has been entered it may at once be enforced and executed, unless enforcement is stayed by the court under Rule 62(h)."

Section 1291 makes all final decisions appealable. The statute does not define the phrase "final decision". We have held that the new rules have the effect of statutes. *Wilson* v. *Daumit*, *supra*, p. 477. In that opinion we pointed out "* * * and if there is a conflict between a procedure provided in an earlier Act of Congress and that provided by the rules, the former must yield to the latter, * * * for the Act of Congress under which the rules were authorized expressly provided that, after they became effective, any laws in conflict therewith would no longer be of any force or effect."

We agree that in one sense the jurisdiction of a court of appeals is at least indirectly affected by an order or

judgment with a "determination" under Rule 54(b). But, in a somewhat similar manner, our jurisdiction was often affected by Rule 73(a) whereby the time was shortened for taking an appeal, yet we had no difficulty in upholding and enforcing that rule. *Ray, et al.* v. *Morris, et al.*, 170 F. 2d 498.

In his concurring opinion in *Lopinsky*, 194 F. 2d at 428 Judge Clark refers to a number of the rules in the Federal Rules of Civil Procedure, while referring directly to district court practice, do have some consequential effect on when courts of appeal might consider the issues. As far as we are advised, the validity of these rules has not been questioned because of the effect on when a court of appeals [fol. 55] may pass upon the issues. We have no difficulty in applying the positive approach in interpreting Rule 54(b).

In our judgment the negative operation of Rule 54(b) affects appellate jurisdiction just as much as the positive approach. In either case the district judge is timing his final decision on less that all of the claims in a multiple claim suit. Under either approach, the jurisdiction of the court of appeals is indirectly affected. We think that the rule-making authority of the Supreme Court existed as to all procedural matters and activities in the district court even though they might consequentially affect appellate jurisdiction.

Our decision herein, is in accord with our statement in *Winsor* v. *Daumit*, *supra* p. 478: "We think, also, that the rule should not be considered as curtailing appellate jurisdiction but rather as one fixing the procedure of the district court as to conditions affecting terms upon which an appeal may be taken in advance of a determination of the entire case."

In view of our decision it is not necessary to decide the point much discussed in the briefs as to whether the order and judgment entered herein would have been final and appealable prior to the 1948 Amendment of Rule 54(b).

The motion to dismiss the appeal is Denied.

[fol. 56] In United States Court of Appeals
for the Seventh Circuit

No. 11225

Bruce A. Mackey, individually and Time Saver Tools, Inc., An Illinois Corporation, Plaintiffs-Appellants,

vs.

Sears, Roebuck and Co., a New York Corporation, Defendant-Appellee

Order Denying Motion to Dismiss the Appeal.—January 18, 1955

This matter comes before the Court on a Motion to Dismiss Appeal, answer thereto, and memorandum briefs, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by the Court that the Motion to Dismiss this appeal be, and the same is hereby, denied.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] Supreme Court of the United States
October Term, 1954

No. 617

[Title Omitted]

Order Allowing Certiorari.—Filed March 28, 1955.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Harlan took no part in the consideration or decision of this application.

(2659-1)